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IN THE

Supreme Court of the United States

FILED
APR 1 1974

October Term, 1973

No. 73-1463

RAPHAEL KONIGSBERG and KENNETH W. ROTTGER,
Petitioners,

vs.

RICHARD M. NIXON, as individual,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioners, Raphael Konigsberg and Kenneth W. Rottger, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 11, 1974.

Nature and History of Case.

This action is one to restrain, by way of injunction, the unlawful occupancy by the defendant-appellee of the office of President of the United States [R. 2, lines 2-4]. The ground of the action is gross fraud in the election on November 7, 1972 [R. 2, lines 4-6]. No answer was filed. The action was dismissed by the District Court on its own motion on the ground that it had no jurisdiction, for the reason that the action presented only a political question [R. 23, lines 17-19]. The Court of Appeals affirmed [App. 1].

Opinions Below.

The opinion of the court below, as shown by a notation thereon, will not be published. It is given in full in the Appendix, *infra*, beginning at page 1 thereof.

The order of the District Court, Civil No. 73-907-HP, was entered on June 12, 1973. It also appears not to be officially reported. It is set out in the Appendix, *infra*, at page 2 thereof.

Jurisdiction.

The judgment of the Court of Appeals was entered, as above stated, on March 11, 1974. The jurisdiction of this Court is based on 28 U.S.C. §1254(1).

Question Presented.

The question presented, as shown by the opinion of the Court of Appeals, is whether gross fraud in an election is a political issue over which a court has no jurisdiction where the fraud relates to matters committed by the Constitution to the executive branch of the government.

Statement.

The plaintiffs, as alleged in their complaint, are citizens of the United States, and on November 7, 1972, were residents of the County of Los Angeles, State of California, and qualified voters in the election on that date for President of the United States [R. 1, lines 27-31]. The defendant resides at San Clemente, California [R. 1, line 31].

As further alleged in the complaint, on or about October 26, 1972, defendant, as then President of the United States, referring to the war in Vietnam and

other parts of Southeast Asia and speaking through a person or persons fully authorized to speak for him, informed the press and the people of the United States that "peace" was "at hand." [R. 2, lines 8-13].

As further alleged in the complaint, between that date and the election, November 7, 1972, defendant made no statement materially or significantly at variance with that information [R. 2, lines 15-17].

As further alleged in the complaint, defendant gave that information to the press and the people for the purpose of assuring his reelection on November 7, 1972; and that information did assure his reelection on that date, and rendered futile all efforts to elect in his place an opposing candidate [R. 2, lines 19-23]. Voters in said election reasonably relied on defendant's statements regarding the war because he was then President of the United States [R. 2, lines 23-25].

As further alleged in the complaint, when defendant gave that information to the press and the people it was wholly, knowingly and intentionally false; it was contrary to and in conflict with defendant's own plans, intentions and directions, unpublished, as Commander-in-Chief of the military forces of the United States [R. 2, lines 27-31]. Defendant, after the election, carried out his said contrary plans and intentions [R. 3, lines 2-11].

As further alleged in the complaint, defendant's giving the information, prior to and up to the election, to the press and the people, that "peace" was "at hand", constituted interference with the freedom of the election on November 7, 1972, within the meaning of 42 U.S.C. Section 1972, R.S. Section 2003; and also

constituted gross fraud in the election so as to render the said election of President of the United States invalid and void [R. 3, lines 13-19].

As further alleged in the complaint, other acts occurred in which defendant participated, or which he permitted, directed, or otherwise caused or induced, constituting gross fraud, and other violations of law, in the said election, so as to render the said election invalid and void [R. 3, lines 22-26]. Also, other persons than defendant knowingly took part in all of the acts above alleged which constituted gross fraud, so as to render the said election invalid and void whether or not defendant himself participated therein [R. 3, lines 28-31].[1]

As further alleged in the complaint, because of such invalidity of the said election, the inauguration of defendant on January 20, 1973, was wholly illegal, and without support in the Constitution [R. 4, lines 2-5]. In their prayer for relief plaintiffs prayed that defendant be permanently enjoined from acting as President of the United States during the term begun January 20, 1973 [R. 4, lines 30-32].

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[1]At the hearing in the District Court, plaintiffs sought permission to amend. There had been no previous amendment. Still permission was denied (App., p. 3). The sole purpose of the amendment was to specify the said other acts and the said other persons. We suggest that in periods subsequent to said hearing such publicity has been given to such other acts and other persons that this court can take judicial notice of them. In any case, for the right to such amendment see 28 U.S.C., F.R. Civ. P. Rule 15(a), first sentence.

REASONS FOR GRANTING THE WRIT.

1. The Decision of the Court Below Is Clearly in Conflict With the General Law on the Integrity of Elections.

In the complaint filed petitioner, for the law applicable to fraud in elections, cited 29 C.J.S., Elections, Sec. 217 [R. 3, lines 19-20].

The headnote there states that where "fraud in connection with an election is such that the true result of the election cannot be ascertained, the election is invalid." Clearly, then, if there is gross fraud in an election, such as activities connected with it which falsify or conceal facts relevant to it, to such an extent that no true decision of the voters is possible, the election is invalid.

Moreover, neither the court below nor the District Court cited a single case, nor any article, even suggesting, as the court below held, that fraud in an election presents only a political question where it relates to "matters committed by the Constitution to the Executive branch of our government"; nor indeed, suggesting that gross fraud in an election can ever be only a political question. Such a doctrine obviously would allow the use of governmental power to subvert electoral process in order to preserve and perpetuate itself.

2. The Decision Below Is in Conflict With the Decision of the United States Court of Appeals for the District of Columbia Circuit, October 12, 1973, in Nixon vs. Sirica, 487 F.2d 700, and Decisions of This Court Cited Therein and Named Below.

In the said decision of the United States Court of Appeals for the District of Columbia Circuit, it was held, 487 F.2d at pages 717-718, that matters com-

mitted by the constitution to the executive branch, even those so committed to the executive branch that they occasioned "the confidentiality of White House discussions," are outweighed by such matters as "the integrity of the electoral process". It is stated there also that the interest in that integrity was stressed in such cases as: *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548, 93 S. Ct. 2880 (1973), and *United States v. United Automobile Workers,* 352 U.S. 567, 575 (1957). We submit that the decision below is for that reason also in conflict with those cited cases.

Conclusion.

In conclusion we submit, for the reasons given above, that the Writ of Certiorari sought herein should be granted.

Respectfully,

GEORGE T. ALTMAN,
Attorney for Petitioners.

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

DO NOT PUBLISH.

United States Court of Appeals, for the Ninth Circuit.

Raphael Konigsberg and Kenneth W. Rottger, Plaintiff-Appellants, vs. Richard M. Nixon, as individual, Defendant-Appellee. No. 73-2455.

MEMORANDUM

[March 11, 1974].

Appeal from the United States District Court, for the Central District of California.

Before: CHOY, WALLACE and SNEED, Circuit Judges.

We affirm the district court's dismissal of appellants' complaint without leave to amend for raising a political question over which the court lacks jurisdiction.

The action is to enjoin Richard M. Nixon from acting as President of the United States during the term begun January 20, 1973. Appellants allege that during October 1972, among other acts, Mr. Nixon falsely informed the public that peace was at hand for the purpose of assuring his reelection in November 1972, thus perpetrating gross fraud in the election and thereby rendering the election void.

Such statements relating to matters committed by the Constitution to the Executive branch of our government involve political questions over which the courts have no jurisdiction.

We need not reach the issue whether appellants have standing to maintain such an action.

Affirmed.

Order Dismissing Complaint.

United States District Court, Central District of California.

Raphael Konigsberg and Kenneth Rottger, Plaintiffs, v. Richard M. Nixon, Defendant. Civil No. 73-907-HP.

The court has reviewed the complaint on file in this action and has determined that it essentially raises political questions over which this court lacks jurisdiction. See Hart and Wechsler, The Federal Courts and The Federal System 2d Ed. 233 (1973).

On the court's motion,

IT IS ORDERED that the complaint in this action is dismissed.

IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order, by United States mail, upon the attorneys of record for the parties herein.

Dated: June 12, 1973.

/s/ Harry Pregerson
Harry Pregerson
United States District Judge

Denial of Leave to Amend.

[Transcript of Hearing, District Court, June 6, 1973. Page 14, Lines 19-25].

MR. HANNON: Thank you, your Honor. Excuse me, your Honor. Would your Honor grant the plaintiffs leave and time to file an amended Complaint and to file a memorandum of points and authorities on the issue of whether it is a political question?

THE COURT: I am satisfied that it is. I am going to let the order stand.

In the Supreme Court of the United States

OCTOBER TERM, 1973

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RAPHAEL KONIGSBERG, ET AL., PETITIONERS

v.

RICHARD M. NIXON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners brought this action in the district court seeking to remove the respondent from his office as President of the United States. The district court dismissed the action *sua sponte* for lack of jurisdiction (Pet. App. 2), and the court of appeals affirmed (Pet. App. 1).

The courts have no jurisdiction to remove an incumbent President from office. Such power is placed by the Constitution of the United States solely in the Congress. U.S. Const., Art I, §§ 2,3, Art. II, § 4.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

DOJ-1974-05

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Petitioners,

vs.

RICHARD M. NIXON,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Reply of Petitioners to Memorandum for the Respondent in Opposition.

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Reply of Petitioner to Memorandum for the Respondent in Opposition.

The sole contention of respondent is that an incumbent President can only be removed from office by Congress, in other words, by impeachment.

But impeachment has no application to the facts alleged here. Impeachment applies only to an office *lawfully* held. *State Ex rel. Moore v. Blake,* 142 So. 418, 419, 225 Ala. 124; 67 C.J.S. Officers, § 68, at fn. 96.

As a result, if the charge against respondent is, as here, acts constituting gross fraud in his election, his election may be proved invalid and void so that impeachment would not apply.

Again, if, as here alleged, other persons than respondent knowingly took part in all of those acts, the election may be proved invalid and void whether or not respondent participated in those acts.

Thus, impeachment has no bearing here; the issue here is the validity of the election. Indeed, had the court below also adopted respondent's impeachment contention, that would, in view of *State Ex rel. Moore v. Blake, supra,* have added a third conflict to the two pointed out in our petition as reasons for granting the writ.

Respectfully submitted,

GEORGE T. ALTMAN,
Attorney for Petitioners.

SUPREME COURT, U. S.
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vs.

RICHARD M. NIXON

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

This case is of great importance because of its bearing on the issue in United States v. Nixon, Nos. 73-1766 and 73-1834, now pending before this Court.

The facts alleged here, No. 73-1463, are, as shown in our petition, acts in which defendant and other persons participated, in the Presidential election of 1972, in impairing the regularity and integrity of the election, for the purpose of assuring extension of defendant's incumbency for a second term. Because of said acts, our petition then contends, the said election was rendered invalid and void, and regardless of whether defendant himself participated in said acts.

In Nos. 73-1766 and 73-1834, there is a *prima facie* showing, based on evidence presented, of a conspiracy in which defendant and others were likewise involved,

for the very same purpose, extension for another term of defendant's incumbency, and in like impairment of the regularity and integrity of the electoral process. In that proceeding in this Court defendant attempts to prevent disclosure of the evidence involved by assertion of a present executive privilege, but that privilege, if it exists, is then but a product of, and dependent on, the very incumbency which was the purpose and product of that conspiracy.

Thus a crime is asserted as its own defense. Our contention in No. 73-1463 avoids this fallacy of reasoning and reaches through to the heart of the issue, whether the rights and rules are controlled by an incumbency which in true effect is itself the thing under challenge.

Because of this bearing of the cause here, in No. 73-1463, on the cause in Nos. 73-1766 and 73-1834, and the enlightenment which it can give thereto, we point to the factor of importance in urging again that the writ of certiorari be granted here.

Respectfully submitted,

GEORGE T. ALTMAN,

Attorney for Petitioners.

Certificate of Counsel.

As counsel for the petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

GEORGE T. ALTMAN,
Counsel for Petitioners.